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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

ALISHA G.,

Petitioner,

v.

THE SUPERIOR COURT OF STANISLAUS
COUNTY,

Respondent;

STANISLAUS COUNTY COMMUNITY
SERVICES AGENCY,

Real Party in Interest.

F073125

(Super. Ct. Nos. 517123, 517124,
517125, 517413)

OPINION

THE COURT*

ORIGINAL PROCEEDING; petition for extraordinary writ review. Ann Q.
Ameral, Judge.

Thomas P. White, under appointment by the Court of Appeal, for Petitioner.

No appearance for Respondent.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County
Counsel, for Real Party in Interest.

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* Before Levy, Acting P.J., Gomes, J. and Franson, J.

Alisha G. seeks extraordinary writ review of the juvenile court's orders setting a Welfare and Institutions Code section 366.26¹ hearing as to her daughters Arianna L. and A.L., and sons Michael G. and Francisco L. The court set the section 366.26 hearing at a combined 12-month review and dispositional hearing at which it terminated Alisha's reunification services as to Arianna, A.L., and Michael, ordered Francisco removed from her custody, and denied her reunification services as to Francisco pursuant to section 361.5, subdivision (b)(10). Alisha contends substantial evidence does not support the juvenile court's orders. We deny the petition.

PROCEDURAL AND FACTUAL SUMMARY²

Alisha G. and Armando L. are the parents of Arianna L. and A.L., now six and three years old respectively, and Francisco L., now five months old. Alisha and Armando are an intact couple in a longstanding romantic relationship. They also have a significant history of domestic violence and drug use, including methamphetamine and ecstasy. Alisha is also mother to Michael G., now nearly two years old. Michael was conceived while Armando was incarcerated, serving his second prison term for domestic violence perpetrated against Alisha. Michael's father is B.L.

In September 2014, Alisha and Armando took then four-month-old Michael to the emergency room where he was diagnosed with a fractured femur. Neither Alisha nor Armando could provide a consistent or plausible explanation for Michael's injury. They

¹ All statutory references are to the Welfare and Institutions Code.

² This case marks our third review of these dependency proceedings. We affirmed the juvenile court's orders denying section 388 petitions brought by Armando L., father of Arianna, A.L. and Francisco. (*In re Arianna L. et al.* (Jan. 14, 2016, F071764, F071765 [nonpub. opn.]); *In re Arianna L. et al.* (Apr. 8, 2016, F072356 [nonpub. opn.]).) We take judicial notice of the records in those cases pursuant to Evidence Code sections 452, subdivision (d)(1), and 459.

were interviewed separately by a social worker from the Stanislaus County Community Services Agency (agency).

Alisha told the social worker that two days before, she placed Michael on the sofa in the living room with pillows around him to keep him secure. She left the room to get a diaper. She said that Arianna was in her bedroom watching television, A.L. was in the living room with Michael, and Armando was outside talking to a cousin. She returned to the living room and saw A.L. on the sofa with Michael and heard Michael cry. She heard nothing unusual in Michael's cry. She rocked him for approximately five minutes and he calmed down. She changed his diaper and he did not cry. She did not notice anything unusual about his behavior until the next day, when she noticed that he cried while having his diaper changed. She already had a pediatrician's appointment the next day and decided to wait until then to have him evaluated. However, when she and Armando were unable to have him seen the next day because their Medi-Cal was cancelled, they took Michael to the emergency room.

Armando gave a different version of the events surrounding Michael's injury. He said that three days before, Arianna and A.L. were in the living room with Michael, who was lying on the couch. Armando did not know where Alisha was at the time. Armando left the room to prepare a bottle and heard Michael cry. He saw Alisha run to Michael and change his diaper, which caused him to cry more. Over time, they noticed that Michael cried when his leg was touched. Armando also explained the situation with Medi-Cal and why they decided to take Michael to the emergency room.

Michael's attending physician stated that Michael's fracture was indicative of child abuse, explaining that it required a significant amount of force to fracture a baby's femur. The social worker asked whether then one-year-old A.L. could have injured Michael by leaning on him as Alisha and Armando had suggested. The physician stated that if A.L. leaned on Michael it would not have caused the injury, and that A.L. could not have broken Michael's femur even if she had jumped on it.

Armando's parole officer stated that Armando had a very difficult time taking care of a baby that was not his. Armando refused to change Michael's diaper or hold a baby that was not "his blood."

The agency took the children into protective custody and placed them together in foster care. It also filed a dependency petition alleging they fell within the juvenile court's jurisdiction under section 300, subdivisions (a) (serious physical harm), (b) (failure to protect), and (e) (severe physical abuse) (hereafter "the subdivision (e) allegations").

The juvenile court detained the children pursuant to the petition and ordered the agency to offer Alisha, Armando and B.L. services, and to arrange supervised visitation pending its disposition of the case. The agency referred Alisha and Armando for parenting and domestic violence offender's classes and a substance abuse assessment. The court also set a combined jurisdictional/dispositional hearing (hereafter "the combined hearing") for late October 2014.

The combined hearing was continued for several months as the agency sought to subpoena hospital and police records. Meanwhile, Alisha and Armando entered residential drug treatment and regularly visited the children. However, the agency observed some concerning behavior during visitation. Alisha interacted more with the girls than with Michael, and Armando would not even refer to Michael by name, instead calling him "fat boy." In addition, Arianna was clearly afraid of Armando and regularly voiced her fear and lack of interest in visiting him. Further, although Arianna sometimes warmed up to her father during visits, she also claimed that he hit her and A.L.

In January 2015, the juvenile court convened the combined hearing. In its report for the hearing, the agency recommended the juvenile court sustain the allegations in the petition and deny Armando and Alisha reunification services (§ 361.5, subds. (b)(5) & (6)). At the hearing, county counsel informed the court that the agency had negotiated with Armando and Alisha to offer Alisha reunification services and deny them to

Armando. County counsel further informed the court that the agency had been in the process of securing expert testimony and additional evidence to support its subdivision (e) allegations, but had abandoned its efforts in light of the agreement. County counsel asked the court to dismiss the subdivision (e) allegations, sustain the remaining allegations, and deny Armando reunification services under section 361.5, subdivision (b)(6).

The juvenile court struck the subdivision (e) allegations³ and Alisha waived her right to a contested hearing on the remaining allegations. Armando's attorney made an offer of proof, accepted by the parties, that he understood the resolution and intended to continue counseling and to remain in the clean and sober home.

The juvenile court adjudged the children dependents under section 300, subdivisions (a) and (b). In ruling, the court found that Michael was seriously injured nonaccidentally by a parent and that there was sufficient evidence to indicate that Armando was the perpetrator. The court also ordered reunification services for Alisha and B.L. and denied Armando reunification services under section 361.5, subdivision (b)(6). The court scheduled a six-month review hearing for June 2015.

Alisha's reunification plan required her to complete a domestic violence program, individual counseling, parenting education, and substance abuse treatment. It also required her to demonstrate she could protect the children from Armando and acknowledge her failure to protect Michael.

Over the next six months, Armando filed three petitions under section 388 asking the juvenile court to order reunification services for him. He filed the third one in July 2015. By that time, he had completed an anger management program, a parenting program, and a three-month drug and alcohol treatment program. He had also

³ By striking the subdivision (e) allegations, the juvenile court eliminated section 361.5, subdivision (b)(5) as a basis for denying Armando reunification services.

participated in 29 domestic violence group sessions, continued to participate in substance abuse classes, and attended Narcotics Anonymous meetings. He was residing at a Salvation Army shelter, had remained clean and sober, and received rave reviews from David Polinsky, the group facilitator of his domestic violence and parenting programs. The juvenile court summarily denied all three of Armando's section 388 petitions, ultimately determining that providing Armando reunification services would not promote the children's best interests.⁴

During this same time period, Alisha completed a substance abuse program at Nirvana Drug & Alcohol Treatment Institute and tested negative for drugs during her time there. She also attended weekly parenting group sessions and domestic violence counseling, and appeared to be making progress. The agency was concerned, however, that Alisha showed little interest in Michael. At the end of visits, she hugged and kissed the girls, but not Michael. She had to be reminded to take him out of his car seat, and left him lying on the floor on a blanket while she played with the girls. The agency was also concerned that Alisha maintained a relationship with Armando and refused to believe that he could have injured Michael.

In its report for the six-month review hearing, the agency recommended the juvenile court terminate Alisha and B.L.'s reunification services. The agency reported that B.L. had made little effort to engage in his services plan.

In August 2015, the juvenile court conducted the six-month review hearing. Following a conference among the parties, the court continued reunification services to the 12-month review hearing, which it set for October 2015. The court found that Alisha made "fair" progress.

By October 2015, Alisha had completed inpatient drug treatment and was living at the Redwoods Family Center, a clean and sober living facility. She had also completed a

⁴ See footnote 2, *ante*, page 2.

parenting program and was participating in domestic violence counseling and individual counseling. However, she maintained she did not know how Michael was injured and she continued her relationship with Armando despite the agency's grave concerns. She also showed little interest in Michael. As an example, in June 2015, the staff helped then one-year-old Michael walk into the visitation room to show Alisha his new skill. Alisha turned her back and did not acknowledge him. She also regularly told the girls she loved them but did not say that to Michael. She also sent the girls home with toys but gave Michael nothing. She threw birthday parties for the girls but not Michael. She also refused to hold and comfort Michael after he received his immunization shots.

The agency recommended the juvenile court terminate Alisha and B.L.'s reunification services at the 12-month review hearing. The court set a contested 12-month review hearing for late November 2015. Meanwhile, Alisha gave birth to Francisco.

An agency social worker spoke to Alisha a day after Francisco's birth. Alicia said she planned to take Francisco to Redwoods. She said Armando was Francisco's father but that she had not had contact with him since February 2015. She said it was possible Armando broke Michael's leg and that he was mad when he found out that Michael was not his child, however, she did not know what really occurred. She planned to keep Francisco safe by calling emergency assistance if Armando contacted her in person.

Armando told the social worker he last saw Alisha in February 2015. He denied hurting Michael and said he was blamed because of his felony criminal history, history of terrorists threats and gang affiliations. He said he had turned his life around and did not want Francisco to be placed in foster care.

The agency placed a protective hold on Francisco at the hospital and filed a dependency petition on his behalf, alleging he was at a substantial risk of neglect based on the circumstances of Michael's injury. (§ 300, subds. (b) & (j).) The agency placed Francisco with his siblings in foster care.

In November 2015, the juvenile court ordered Francisco detained and ordered Armando to undergo paternity testing. The agency recommended the juvenile court deny Alisha reunification services as to Francisco under section 361.5, subdivision (b)(10), because she failed to address the cause of Michael's injury and reunify with him, Arianna, and A.L. The agency also recommended the court deny Armando reunification services. (§ 361.5, subd. (b)(6) & (7).) The court set a combined hearing to serve as the jurisdictional/dispositional hearing as to Francisco, and the 12-month review hearing as to the three older children.

The juvenile court conducted the combined hearing over several sessions in January 2016. By that time, Alisha had completed her service requirements and had been clean and sober for a year and four months. At the beginning of the first session, the juvenile court informed the parties it was inclined to conduct both cases at the same time since a number of the witnesses were the same. All the parties agreed.

David Polinsky testified that Armando was participating in services on his own volition. Armando told Polinsky that he and Alisha had been "partying" for a day or two when they discovered that Michael had been injured. When they took Michael to the hospital, they discovered that his leg had been broken for a day and a half. Armando never said whether he caused Michael's injury or knew how it occurred.

Juana Aguilar-Jimenez, Alisha's clinician, said Alisha did not know how Michael was injured but thought her mother or Armando could have injured him. Alisha said she was not in a relationship with Armando. Ms. Aguilar-Jimenez said that Alisha and the children were affectionate with each other. Alisha did not believe that she treated Michael differently.

Alisha testified the first incident of domestic violence in her relationship with Armando occurred when she was pregnant with Arianna. Armando tried to stab her and was sent to prison. They resumed their relationship when he was released. He subsequently tried to choke her while she was holding Arianna and was sent to prison a

second time. Again, they resumed their relationship upon his release. Alisha denied that she wanted to raise the children with him as a family. Instead, she wanted the juvenile court to place the children with her at Redwoods. She planned to keep the children safe by staying away from people and places that might trigger her to relapse. She also planned to go to church, stay in contact with her support group, and attend meetings.

At the conclusion of the hearing, the juvenile court followed the agency's recommendations. The court recognized the progress Alisha made toward completing her services plan but stated she had not demonstrated that she could protect the children because she failed to recognize Armando as a possible perpetrator. In addition, the court did not find Alisha's testimony that she did not intend to resume a relationship with Armando credible, stating, "I believe that you probably intend at some point in the not too distant future when [the agency] gets off your back to probably go back to [Armando]" The court found the agency provided Alisha reasonable reunification services but that her progress in alleviating or mitigating the need for the children's removal was limited. The court also found there was not a substantial likelihood Arianna, A.L. and Michael (hereafter "the siblings") could be returned to Alisha's custody by the 18-month review hearing in March 2016 and terminated her reunification services as to them. The juvenile court ordered Francisco removed from parental custody and denied Alisha reunification services under section 361.5, subdivision (b)(10). The court also set a section 366.26 hearing and ordered that the children be made available for a bonding study.

This petition ensued.⁵

⁵ Armando did not file a writ petition.

DISCUSSION

I. *Termination of Reunification Services*

There is a statutory presumption at the 12-month review hearing in a child dependency case that the child will be returned to parental custody unless the juvenile court finds, by a preponderance of the evidence, that the child's return would create a substantial risk of detriment to the child's physical or emotional well-being. (§ 366.21, subd. (f)(1).) Under the statute, a parent's failure to regularly participate and make substantive progress in a court-ordered plan of reunification constitutes prima facie evidence of detriment. (§ 366.21, subd. (f)(1)(B).) That is not to say, however, that a parent who regularly participates and makes progress in a court-ordered reunification plan has eliminated any risk he or she poses to a child. Ultimately, the question is whether the child can be safely returned to parental custody notwithstanding the parent's efforts at complying with a services plan. (*In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1141-1142.)

Alisha argues that the siblings would have been safe if returned to her custody because she complied with her services plan and made substantial progress, was living in a clean and sober environment, and no longer had contact with Armando. Therefore, she contends, the juvenile court erred in finding it would be detrimental to return them to her custody.

On a challenge to the juvenile court's finding of detriment, we review the record to determine whether substantial evidence supports the finding. (*In re Barbara R.* (2006) 137 Cal.App.4th 941, 951.) We conclude in this case that it does.

The siblings were removed from Alisha's custody because Michael was physically abused while in her and Armando's care and she could not explain how it occurred. After a year of services, Alisha refused to accept that Armando may have physically abused Michael even though the evidence implicated him. Instead, she wanted to

maintain a relationship with Armando at the risk of exposing the children to further injury. By failing to identify Armando as the possible perpetrator of Michael's injury and take the necessary steps to protect the children, Alisha posed a threat of detriment to them if placed in her custody. Consequently, the evidence supports the juvenile court's finding she made limited, not substantive, progress and thus a prima facie showing of detriment.

When the juvenile court finds it would be detrimental to return a child to parental custody, as the court properly did here, it has no choice but to terminate reunification services.⁶ Thus, we uphold the juvenile court's order terminating Alisha's reunification services.

II. Removal

In order to remove a child from parental custody, the juvenile court must find by clear and convincing evidence "there is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the [child] if the [child] were returned home, and there are no reasonable means by which the [child's] physical health can be protected without removing the [child] from the [child's] parent's ... physical custody." (§ 361, subd. (c)(1).)

"The juvenile court has broad discretion to determine what would best serve and protect the child's interest and to fashion a dispositional order in accordance with this discretion." (*In re Jose M.* (1988) 206 Cal.App.3d 1098, 1103-1104.) "A removal order is proper if it is based on proof of parental inability to provide proper care for the minor and proof of a potential detriment to the minor if he or she remains with the parent. [Citation.] The parent need not be dangerous and the minor need not have been actually

⁶ To clarify, the juvenile court has no choice unless it finds a substantial probability that the child can be returned to parental custody by the 18-month review hearing or that the parent was not provided reasonable services. If the court makes either of those findings, it must continue services to the 18-month review hearing. (§ 366.21, subd. (g)(1) & (4).)

harmful before removal is appropriate. The focus of the statute is on averting harm to the child.” (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, overruled on other grounds in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735 (*Renee J.*).)

On a challenge to the juvenile court’s dispositional order, we review the evidence to determine whether substantial evidence supports it. We do so bearing in mind that the juvenile court’s decision to order a child removed from parental custody must be supported by the heightened standard of clear and convincing evidence. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) We conclude substantial evidence supports the juvenile court’s removal order.

Alisha posed a substantial danger to Francisco’s safety because she maintained a relationship with Armando. Though Alisha denied this, the juvenile court did not find her credible. The court believed that as soon as she was no longer under the scrutiny of the agency she would resume her relationship with him as she had done so many times before.

Alisha contends that Francisco would have been safe with her in the controlled environment of Redwoods. In essence, she argues that Redwoods presented a reasonable means to prevent removal. Even if that were true, there was nothing preventing her from leaving Redwoods with Francisco and reuniting with Armando. Until Alisha could convince the juvenile court that she could protect Francisco, the court had no choice but to order him removed from her custody in order to ensure his safety.

III. Denial of Reunification Services

Parents of dependent children are generally entitled to reunification services “aimed at assisting the parent in overcoming the problems that led to the child’s removal.” (*Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 546.) The statute governing reunification services is section 361.5. Subdivision (a) of section 361.5 embodies the general statutory mandate for the provision of reunification services whenever a dependent child is removed from parental custody. Subdivision (b) of

section 361.5 sets forth a number of circumstances in which reunification services can be bypassed. These bypass provisions reflect the Legislature's recognition that "it may be fruitless to provide reunification services under certain circumstances. [Citation.] Once it is determined one of the situations outlined in subdivision (b) applies, the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources.'" (*Renee J.*, *supra*, 26 Cal.4th at p. 744, superseded by statute on another ground as stated in *In re: Angelique C.* (2003) 113 Cal.App.4th 509, 518-519.)

At issue here is section 361.5, subdivision (b)(10), which applies when reunification services previously provided with respect to the dependent child's sibling have been terminated. It provides in relevant part:

"(b) Reunification services need not be provided to a parent ... described in this subdivision when the court finds, by clear and convincing evidence ...: [¶] ... [¶] (10) That the court ordered termination of reunification services for any siblings or half siblings of the child because the parent ... failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent ... and that, according to the findings of the court, this parent ... has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half-sibling of that child from that parent" (§ 361.5, subd. (b)(10).)

Subdivision (b)(10) contemplates a two-prong inquiry: (1) whether the parent previously failed to reunify with the dependent child's sibling(s); and (2) whether the parent "subsequently made a reasonable effort to treat the problems that led to removal of the sibling." (§ 361.5, subd. (b)(10); *Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 96 (*Cheryl P.*).)

We review the juvenile court's order denying reunification services under section 361.5, subdivision (b), for substantial evidence, bearing in mind that application of the statute requires clear and convincing evidence. (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 600; *In re Alvin R.* (2003) 108 Cal.App.4th 962, 971.)

Alisha contends the juvenile court misapplied section 361.5, subdivision (b)(10). First, she argues that the court has to terminate reunification services for a sibling prior to conducting a hearing on the applicability of the statute. Since the juvenile court had not terminated Alisha's reunification services before the close of evidence, appellate counsel contends, the first prong of the statute was not satisfied. We disagree.

Here, the parties agreed that the juvenile court would conduct one evidentiary hearing for purposes of the 12-month review and disposition. Following argument, the court terminated reunification services as to the siblings prior to denying Alisha reunification services for Francisco under section 361.5, subdivision (b)(10). Alisha does not provide any authority that requires that the termination of services order precede the presentation of evidence on the applicability of the statute, nor are we aware of any.

Alisha further contends the juvenile court misapplied the statute because it considered the wrong time period in determining whether she made reasonable efforts to treat the problem. Citing *Cheryl P.*, she argues the juvenile court should have considered the period beginning with the removal of the siblings rather than the period beginning with Francisco's initial detention. Had the court applied *Cheryl P.*, she further argues, it would have had to consider that she had completed or nearly completed all of her court-ordered services.

Cheryl P. represents one of two views as to the interpretation of the modifier "subsequently" with respect to when the reasonable efforts are to be made. *Cheryl P.* holds that it refers to parental efforts made following the removal of the sibling. (*Cheryl P.*, *supra*, 139 Cal.App.4th at p. 98.)⁷ In this case, it does not matter what time

⁷ *In re Harmony B.* (2005) 125 Cal.App.4th 831 (*Harmony B.*) represents the other view. The *Harmony B.* court interpreted the event triggering the "reasonable efforts" in section 361.5, subdivision (b)(10) as the termination of reunification services as to the sibling. Where the juvenile court terminates reunification services as to the sibling and denies reunification services as to the child in close proximity, the court stated, "the 'no-

period the juvenile court considered in evaluating the reasonableness of Alisha's efforts. The problem that required the siblings' removal was the danger that Armando would physically abuse the children. Though Alisha complied with the technical requirements of her services plan, she refused to address the core issue that prevented her from reunifying with her children. That is, she refused to acknowledge that Armando seriously harmed Michael and to take steps to protect the children from him. Instead, she chose to maintain the relationship.

In ruling, the juvenile court stated it did not know who physically harmed Michael. Though it previously found that Armando harmed him, the court stated it wondered if perhaps Alisha was the one. In any case, it explained that Alisha had made no effort to protect Francisco from Armando. She would not acknowledge Armando as a possible perpetrator and she concealed her relationship with him. When a parent refuses to be protective, the court has no choice but to rule as it did here.

We find no error on this record.

DISPOSITION

The petition for extraordinary writ is denied. This opinion is final forthwith as to this court.

reasonable effort' clause is a formality because the parent's circumstances necessarily will not have changed." (*Id.* at pp. 842-843 [footnote omitted.])